FILE COPY

No. 765

Office-Supreme Court, U.S.
FILED
JAN 14 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE [illegible]

[illegible]

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Arizona Grocery Co. v. *Atchison Ry.*, 284 U.S. 370	6
Baer Bros. Mercantile Co. v. *Denver & Rio Grande R.R.*, 233 U.S. 479	6
Hill v. *Federal Power Commission*, 335 F. 2d 355	10
Hoving Corp. v. *Federal Trade Commission*, 290 F. 2d 803	11
Morgan v. *United States*, 304 U.S. 1	7
Sangamon Valley Television Corp. v. *United States*, 269 F. 2d 221	7, 8
Tagg Bros. v. *United States*, 280 U.S. 420	11
United States v. *L. A. Tucker Truck Lines*, 344 U.S. 33	9
United States v. *Morgan*, 307 U.S. 183	8
United States v. *Morgan*, 313 U.S. 409	6, 8
United States v. *Wilson & Co.*, 376 U.S. 944	6

760-299—65

Constitution and statutes:

	Page
U.S. Constitution, Fifth Amendment	2, 6
Administrative Procedure Act:	
Section 2(c), 5 U.S.C. 1001(c)	6
Section 4(a), 5 U.S.C. 1003(a)	29
Section 5(c), 5 U.S.C. 1004(c)	7
Communications Act of 1934, 48 Stat. 1064, 1070, *et seq.*, as amended, 47 U.S.C. 201 *et seq.*:	
Sections 201–205 and 403, 47 U.S.C. 201–205, 403	3
Section 205(a), 47 U.S.C. 205(a)	6
Section 409(c), 47 U.S.C. 409(c)	7

Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947)	7
Davis, *Administrative Law Treatise*, H. Rep. No. 1980, 79th Cong., 2d Sess.	11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 765

WILSON & CO., INC., SWIFT & COMPANY, AND ARMOUR AND COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–41) is reported at 335 F. 2d 788. The final decision of the Federal Communications Commission (A. 269–311) [1] and its memorandum opinion denying reconsideration (A. 313–323) are reported at 34 F.C.C. 217 and 1094.

[1] In accordance with the abbreviation used in the petition (p. 2, n. 1), "A." refers to the printed appendix filed by petitioners in the court of appeals. "J.A." refers to the printed appendix jointly filed below by the government and AT&T.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1964 (Pet. 42), and the petition for a writ of certiorari was filed on December 16, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner ratepayers were denied the procedural safeguards of the Fifth Amendment when members of the Commission's staff who had appeared as counsel of record in a ratemaking hearing participated in the decisional process leading to the prescription of rates.

2. Whether the Federal Communications Commission gave adequate notice of the subject matter of the ratemaking proceeding under Section 4(a) of the Administrative Procedure Act.

STATUTES INVOLVED

Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003(a), and Section 205(a) of the Communications Act of 1934, 48 Stat. 1072, 47 U.S.C. 205(a), are set forth in the petition, pp. 19–20.

STATEMENT

This case concerns a January 1963 decision of the Federal Communications Commission which concluded an eight-year ratemaking proceeding involving the private-line telephone and telegraph services of American Telephone and Telegraph Company and associated companies ("AT&T") and the private-line telegraph services of Western Union Telegraph Com-

pany ("Western Union").[2] The Commission, on the whole, increased the rates for telegraph services and reduced the rates for telephone services, and the Seventh Circuit affirmed. Petitioners are meatpacking concerns which challenged the Commission's decision insofar as it established telegraph rate increases (A. 339).

The pertinent background is as follows:

On March 9, 1956, the Commission instituted a hearing to consider the lawfulness of all private-line tariffs of AT&T and Western Union (A. 341, 343; Sections 201–205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201–205, 403). In addition to enumerating each private-line tariff involved, the Commission, after noting that AT&T had been requested to "conduct a study to determine the costs involved in furnishing private line services and channels" (A. 341),[3] listed three issues to be explored in the proceeding: *i.e.*, whether the tariffs involved "unreasonable discrimination" or gave "unreasonable preference or advantage to any person", whether they contained "unjust and unreasonable" charges, and whether the Commission, acting on its own, should prescribe reasonable charges (A. 342–343).

Thereafter, on August 13, 1957, the presiding examiner released an order outlining the procedural

[2] Private-line services consist of the leasing of communications channels for transmissions between specified locations without requiring the carriers to establish connections for each call or message. The primary services are telegraph and telephone. Both AT&T and Western Union provide private-line telegraph services but only AT&T provides private-line telephone services.

[3] Western Union also was later requested to submit a cost study (J.A. 390–391).

steps to be followed and listing the specific matters to be explored in the hearing. Those matters included (A. 354): "The views and conclusions of the respondents [carriers], supported by basic facts, concerning the reasonableness of the over-all rate levels, of specific rates, and of rate relationships * * *", the "[s]pecific rate adjustment proposals indicated by the cost studies * * *", and "[o]ther tariff rate adjustments needed to simplify and clarify existing private line schedules, and to remove therefrom * * * discrepancies that have grown up * * *."

Hearings were held during 1957, 1958 and 1959, and the record was closed on September 16, 1959. In its initial decision (issued July 14, 1961) the Commission concluded that AT&T's telephone rates were unreasonably high and its telegraph rates unreasonably low (A. 103). As part of the telegraph rate revisions, the Commission abolished existing "clock hour" and "minimum period" schedules, under which charges were determined according to the number of hours and the time of day a customer utilized telegraph services. The Commission found that those schedules were unreasonably discriminatory because "[t]here is little, if any, difference in the cost of furnishing service during the day or night" and the "[c]osts of providing continuous service are not substantially greater than for minimum period service" (A. 114–115).[4]

[4] In all its rate revisions the Commission was guided primarily by the carriers' costs of providing service since, in the Commission's view (A. 96), "the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and nondiscriminatory rates."

Up to this time petitioners had made no attempt to participate in the hearings. After release of the initial decision, they filed a petition for leave to intervene and submitted exceptions to the decision (J.A. 1–21). They complained of the proposed increases in telegraph rates, particularly of the abolition of the "clock hour" and "minimum period" schedules, but did not contend that the notice of the proceeding was legally defective. Petitioners were permitted late intervention by the Commission (A. 469–470).

In January 1963, the Commission issued a final decision substantially affirming its initial findings and conclusions, and in May of 1963 petitions for reconsideration were denied. In a decision entered on August 14, 1964, the Seventh Circuit affirmed the Commission's rate prescriptions in all respects.

Addressing itself to the issues presented here, the court ruled (1) that the notice of the proceeding was "as specific as the Commission could have made it at the time" (Pet. 29) and (2) that participation by agency counsel in the ultimate determination of the rates did not violate the Administrative Procedure Act, the Commission's own rules, or constitutional due process (Pet. 31–34).[5]

---

[5] At the time they filed their petition for review in the court below, petitioners also applied for an interlocutory injunction staying the Commission's telegraph rate orders. The government and AT&T opposed the application, but AT&T also urged that if an injunction were issued it should be made applicable to both telegraph and telephone rates. On September 27, 1963, the court below enjoined, *pendente lite*, the Commission's rate orders "in their entirety." The court refused various requests by the government to condition the injunction so as to provide for eventual restitution to private-line telephone users

ARGUMENT

The decision below is plainly correct and presents no important question of law warranting further review.

1. Petitioners contend (Pet. 8–13) that participation in the decisional process by members of the Commission's staff who also appeared as counsel at the hearings deprived them of a "full opportunity for hearing," guaranteed by the Communications Act (47 U.S.C. 205(a)), and also contravened the Due Process Clause of the Fifth Amendment. Petitioners recognize (Pet. 11–12) that the Administrative Procedure Act does not require staff separation of functions in rulemaking proceedings, and that proceedings—such as the one below—for the determination of future rates are expressly defined as rulemaking in the Act (Section 2(c), 5 U.S.C. 1001(c)).[6]

---

who were being deprived of the benefits of the lower telephone rates ordered by the Commission even though review of those rates was not being sought. A petition for a writ of certiorari to review the failure of the court to condition its injunction was denied on March 9, 1964. *United States* v. *Wilson & Co.*, 376 U.S. 944.

In its final decree affirming the Commission's rate orders the court below dissolved the interlocutory injunction, but denied a request that it retain jurisdiction in order to permit the government to submit a restitution proposal. On December 14, 1964, Mr. Justice Clark granted the government a 60-day extension of time within which to file a petition for a writ of certiorari seeking review of that denial.

[6] This Court has consistently treated ratemaking as rulemaking, rather than as adjudication. See, *e.g.*, *United States* v. *Morgan*, 313 U.S. 409; *Arizona Grocery Co.* v. *Atchison Ry.*, 284 U.S. 370; *Baer Bros. Mercantile Co.* v. *Denver & Rio Grande R.R.*, 233 U.S. 479. In the Administrative Procedure Act and the Communications Act, Congress followed

Their contention that staff participation in the decisional process is constitutionally offensive rests on a misreading of the two decisions upon which they rely, *Morgan* v. *United States,* 304 U.S. 1, and *Sangamon Valley Television Corp.* v. *United States,* 269 F. 2d 221 (C.A. D.C.).

In *Morgan* v. *United States,* the Court reversed a rate order of the Secretary of Agriculture because the interested parties were not given "a reasonable opportunity to know the claims of the opposing party [the Secretary] and to meet them" (304 U.S. at 18). The Secretary had never clarified his position during the hearings (*id.* at 19), and the first notice the parties received of his "concrete claims" was after the Secretary had finally "accept[ed] and ma[de] as his own the findings which ha[d] been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (*id.* at 22).

The case did not hold that preparation of a decision by counsel who had participated in the hearings was *per se* improper. In fact, following the remand, the Secretary of Agriculture reissued his original final

---

that basic dichotomy; the staff separation of functions provisions of those Acts (5 U.S.C. 1004(c); 47 U.S.C. 409(c)) apply only to cases of adjudication. The reason for the dichotomy is that adjudicatory cases are primarily "concerned with the determination of past and present rights and liabilities" and are thus "characterized by an accusatory flavor," while, on the other hand, rulemaking proceedings are "essentially legislative in nature." *Attorney General's Manual on the Administrative Procedure Act*, p. 14 (1947).

decision as an initial or tentative decision, giving the parties an opportunity to file exceptions and to present oral argument on the exceptions, a procedure approved by this Court in *United States* v. *Morgan*, 307 U.S. 183, 187, and again in *United States* v. *Morgan*, 313 U.S. 409, 415–416 (after the taking of new evidence, since several years had passed since the Secretary's first decision).

In the present case, the Commission issued an elaborate initial decision (A. 1–268); and petitioners filed exceptions with a supporting brief and participated in oral argument before the Commission—all prior to the adoption of a final decision. They were thus afforded a fair opportunity to know and meet the Commission's claims, which is all that the *Morgan* cases require.

Sangamon Valley Television Corp. v. *United States* is clearly inapposite. That case "involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege" (269 F. 2d at 224). The court of appeals reversed the Commission's decision on the grounds that it had departed from its own rules and had permitted *ex parte* communications to be made by one of the persons contending for the privilege (see *id.* at 223–224). The case did not involve staff separation of functions. Here, in contrast, the court of appeals found that the Commission had complied with its rules and petitioners do not contend otherwise. Moreover, there has been no suggestion that the Commission's staff, like the maker of the *ex parte* communication in *Sangamon Valley*, had a stake in

the outcome of the proceeding. The holding of that case, therefore, has no relevance here.[1]

2. Petitioners also argue (Pet. 13–17) that the notice of the proceeding, pursuant to Section 4(a) of the Administrative Procedure Act, 5 U.S.C. 1003(a), insufficiently apprised them of the Commission's intention to consider the "clock hour" and "minimum period" provisions of the telegraph tariffs. The court below fully considered the question and found that the Commission's order initiating the proceeding was satisfactory. It held—correctly, we believe—that "[t]he notice was not, as petitioners contend, a statement of issues in general statutory language of legislative delegation of authority. It was as specific as the Commission could have made it at the time" (Pet. 29).

The Commission's notice of hearing of March 9, 1956 (A. 341, 343) adequately described the subjects and issues. It listed each private-line tariff to be considered in the hearings, including the tariffs providing for "clock hour" and "minimum period" rates; stated that AT&T had been requested to "conduct a study to determine the costs involved in furnishing private line services and channels"; and set forth the

[1] Petitioners did not raise the separation-of-functions point before the Commission. The government argued in the court below that petitioners had had notice that staff members might participate in the Commission's decision, and that by failing to object they waived their right to raise the question on appeal. See *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33. The court rejected this argument and a similar contention as to the notice issue discussed in point 2, *infra* (Pet. 27–28). If certiorari is granted, we reserve the right to renew those arguments in this Court.

issues to be explored in the proceeding. Those issues were whether the tariffs involved (a) "unreasonable discrimination," (b) "unreasonable preference or advantage" or (c) "unjust and unreasonable" charges, and (d) whether the Commission should prescribe its own charges (A. 342–343). Additionally, in an order released at the outset of the hearing, the presiding examiner stated that "[s]pecific rate adjustment proposals indicated by the cost studies * * *" would be explored in the proceeding (A. 354).

The notice and order, therefore, left no doubt that the Commission was prepared to determine whether the carriers' private-line tariffs were justified by their costs of service. Since this was the same basic test applied in the decision, and lack of cost justification was the specific reason for abolishing the "clock hour" and "minimum period" schedules (A. 96, 114–116), there is no substantial question of lack of notice of the issues or of the standard to be applied.[8]

Petitioners may not have realized at the outset that the existing cheaper rates for use of telegraph services part-time and at certain hours of the day could not be justified on a cost basis. But this does not mean that they were not fairly apprised of the issues

[8] *Hill* v. *Federal Power Commission*, 335 F. 2d 355 (C.A. 5), relied upon by petitioners (Pet. 15–17), presents no conflict. There the Fifth Circuit held that, largely because of uncertainties created by prior decisions discarding cost of service as a criterion for gas pricing, it was not clear until the agency's final decision that cost of service was to be the standard in that particular case. Here, in contrast to *Hill*, the Commission made clear in the beginning that its review of the carriers' private-line rates was to focus on their costs.

involved, so that they might present relevant data or argument, which is the function of the notice provisions of the Administrative Procedure Act (see H. Rep. No. 1980, 79th Cong., 2d Sess., 24). The description of the issues contained in the notice had a well-established meaning in rate regulation and sufficiently outlined the scope of the proceeding. See *Tagg Bros.* v. *United States,* 280 U.S. 420, 440; Davis, *Administrative Law Treatise,* §§ 8.04, 8.05; cf. *Hoving Corp. v. Federal Trade Commission,* 290 F. 2d 803, 807 (C.A. 2).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General.
LIONEL KESTENBAUM,
GEORGE R. KUCIK,
Attorneys.

HENRY GELLER,
General Counsel,
DANIEL R. OHLBAUM,
Deputy General Counsel,
MICHAEL FINKELSTEIN,
Counsel,
Federal Communications Commission.

JANUARY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965